Friederich Truck Service, Inc. and FTL, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50. Case 14-CA-14290

January 29, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 18, 1981, Administrative Law Judge David P. McDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent Friederich Truck Service filed exceptions and supporting briefs, and Respondents filed briefs in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Friederich Truck Service, Inc., O'Fallon, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

DAVID P. MCDONALD, Administrative Law Judge: The hearing in this case was held in St. Louis, Missouri, on January 22 and 23, 1981, and is based upon unfair labor practice charges filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, herein called the Union, on September 30, 1980,[1] as amended on November 7. On November 10, a complaint was issued on behalf of the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14 and subsequently amended at the hearing.[2] The complaint alleges that Friederich Truck Service, Inc., herein called FTS, established FTL, Inc., as an *alter ego*, and violated Section 8(a)(1), (3), and (5) of the Act.

All parties have been afforded full opportunity to appear, to introduce evidence and cross-examine witnesses, and to file briefs. Based upon the entire record,[3] from my observation of the demeanor of the witnesses,[4] and having considered the parties' post-hearing briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent FTS admits that it is an Illinois corporation engaged in the interstate transport of freight and commodities throughout the St. Louis metropolitan area. It maintains its principal office and place of business at 630 E. State Street, in the city of O'Fallon, Illinois. It further admits that during the 12-month period ending September 30, a representative period, it derived, in the course and conduct of its business operations, gross revenues in excess of $50,000 for transportation of freight and commodities from the State of Missouri directly to points outside Missouri. Accordingly, I find that Respondent FTS is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent FTL admits that it is a Missouri corporation engaged in the interstate transport of freight and commodities throughout the St. Louis metropolitan area. It maintains its principal office and place of business at 400 Brookes Drive, in the city of Hazelwood, Missouri. It further admits that from September 22, 1980, to January 22, 1981, it has in the course and conduct of its business operation within the States of Missouri and Illinois received gross revenues in excess of $50,000 for the transportation of freight and commodities between points located in Missouri and Illinois. Accordingly, I find that Respondent FTL is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondents admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[5]

[1] All dates herein refer to 1980, unless otherwise indicated.

[2] The General Counsel's motion to amend the complaint was granted. Par. 6(a) was amended to indicate the layoff dates of Ronald Renner and Gerald Fix as on or about September 19, 1980. Par. 8(c) was amended to read: "Employees to work for less than contract wages and other terms of conditions of employment."

[3] Counsel for the General Counsel's motion to correct the transcript has been granted.

[4] Witnesses were sequestered.

[5] Since 1975 the Union has been the exclusive bargaining representative of Respondent FTS' employees who are engaged in local pickup, delivery, and assembly of freight within the area located within the jurisdiction of the Union, not to exceed a radius of 25 miles. FTS has recognized the Union in successive collective-bargaining agreements effective April 1, 1976, through March 31, 1979, and April 1, 1979, through March 31, 1982.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

The principal issues raised by the complaint and the hearing are as follows:

1. Is Respondent FTL an *alter ego* of Respondent FTS?

2. Did Respondent FTS violate Section 8(a)(1), (3), and (5) of the Act by:

(a) Laying off employees and by failing and refusing to pay employees contract wages and overtime pay as specified in the applicable collective-bargaining agreement?

(b) Encouraging its employees to withdraw from the Union?

(c) Bypassing the Union to deal directly with its employees, without giving the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent FTS' employees?

(d) Establishing FTL, Inc., as an *alter ego* nonunion company in order to avoid its collective-bargaining obligations?

B. *Facts*

1. Friederich Truck Service, Inc.

FTS was incorporated by Frank L. Tempia, his mother, Pearl Friederich,[6] and his wife, Doris Tempia, on December 1, 1954, in the State of Illinois. The original purpose of the corporation as stated in the articles of incorporation have not changed: ". . . to engage in the business of transporting personal property of every type and description by motor vehicle for hire." There are 100 outstanding common shares. Both Frank Tempia and Pearl Skaer each own one share. Skaer has a life estate in the remaining 98 shares with the remainder in the name of Doris Tempia. On December 7, 1974, the following individuals were elected officers: president, Frank L. Tempia; vice president, Frank N. Tempia; and secretary-treasurer, Doris Tempia. On December 3, 1977, the following individuals were elected officers: president, Frank L. Tempia; vice president, Frank N. Tempia; secretary, Doris V. Tempia; and treasurer, Steven J. Tempia.[7] At a special meeting of the shareholders of Friederich Truck Service, on August 15, 1980, both Frank N. and Steven Tempia tendered their resignations as officers and members of the board of directors. Pearl Skaer was elected to fill the unexpired term of Frank N. Tempia.

FTS has been engaged in the interstate and intrastate transport of freight and commodities both as a common carrier, contract carrier, and a commercial zone carrier, as authorized by the Interstate Commerce Commission and various state authorities. As a contract carrier, FTS handled the account for Venture Stores, for all points between Chicago, Illinois; Davenport, Iowa; Merrilville, Indiana; St. Louis and Kansas City, Missouri; and Overland Park and Kansas City, Kansas. As a common carrier its authority extends from St. Louis and St. Louis County to various points in Illinois, not to exceed 50 miles from the Missouri border. A commercial zone is a deregulated zone. The size of the zone depends on the population of the city. In this particular case the exempt zone is 25 miles from the city limits of St. Louis or East St. Louis.[8] The union employees were responsible for the work performed in the commercial zone. Respondent FTS also uses owner-operators to perform its contract authority and common carrier work. The owner-operators are not employees of FTS.

Two-thirds of all of FTS' business consists of hauling freight and commodities for the Venture Stores in the St. Louis metropolitan area. In addition, it services Venture Stores in the Chicago area. This hauling not only includes delivery of freight from the Venture warehouse in Hazelwood, Missouri, to the various regional stores, but also includes the hauling of piggyback trailers from the railroad terminals to the Venture warehouse. FTS also hauls freight for Famous-Barr, Welsh Industries, and Star Bedding. Occasionally, it also hauls for Schnuck's Market.

Frank Tempia Leasing, herein called the Leasing Company, is a sole proprietorship owned and operated by Frank L. Tempia. It is located in Lebanon, Illinois, approximately 6 miles from FTS. It owns approximately 120 trailers, all of which are leased to Venture, and 4 tractors, 2 of which are leased to FTL through FTS.

The FTS facility in O'Fallon, Illinois, is owned by Frank L. Tempia and leased to FTS. The property consists of a two-story building, a mechanic's shack, and a garage for the maintenance of vehicles. Apparently the building itself is a converted residence. FTS owns three straight trucks and six tractors. Three of its own tractors are leased to FTL along with two tractors it leased from the Leasing Company. Of the three remaining tractors owned by FTS, it uses one tractor and the other two are available for leasing to anyone.

Tempia emphasized that he does not own, lease, control, manage, or in any way have an interest in FTL. In fact, he had never even seen the FTL headquarters in St. Louis County.

2. FTL, Inc.

Frank N. Tempia testified that during the late spring or early summer of 1980, he and his brother discussed the possibility of forming their own corporation, since FTS was not showing a profit. They wanted their own business and an opportunity to make a living. Upon their resignation from FTS, Frank N. and Steven incorporated FTL, Inc. on August 28, with offices located at 400 Brookes Drive, Hazelwood, Missouri. The brothers own equal shares of all outstanding stock.[9] Frank N. is presi-

[6] Pearl Friederich's last name is now Skaer.

[7] Frank N. and Steven J. Tempia are the sons of Frank L. and Doris V. Tempia.

[8] Frank N. Tempia testified he believed the zone to be 20 miles from the city limits of St. Louis and East St. Louis.

[9] On September 3, 19, and 26, 1980, Frank L. Tempia loaned $2,000, $1,000, and $2,000 respectively to FTL, Inc. The loans were secured by three promissory notes with a 3-year maturity date. The loans were made by Frank L. Tempia personally and not in the name of FTS. The purpose of the loans was to assist his sons in starting their new business venture. The $5,000 served as the initial capitalization for FTL.

dent, Orville Zimmerman is vice president, and Steven is secretary-treasurer. All three men serve as the board of directors.

Article 8 of its articles of incorporation defines the purpose of FTL, Inc. as: ". . . own and lease motor vehicles and to transport personal property by motor vehicle for hire." The business commenced on September 22 as a commercial zone carrier. In that capacity it is limited to delivery of freight within an area not to exceed 20 or 25 miles from the corporate limits of St. Louis and East St. Louis.

FTL does not own any tractors, trailers, straight trucks, or computer equipment. Its Hazelwood headquarters consist of an office and a parking lot, where the five tractors are parked when not in use. It does not have or need a loading dock or truck terminal, since the tractors are only used to pick up and deliver trailers at other locations.

Shortly after its inception, FTL entered into a series of leases with FTS. Three of the leases were dated September 5, for three tractors, and bore the signatures of Calvin Ford as FTL's authorized lessor signature. The fourth and fifth leases were for a spotter tractor and a standard tractor, dated September 19 and 29, respectively. Doris Tempia signed the last two leases. The leases were standard printed forms used by FTS whenever it leases its equipment to anyone including owner-operators. The leases were for 1 year and required the lessor:

> [t]o keep said vehicle and equipment in good operating condition during the term of this lease and to pay for all maintenance and general upkeep of said vehicle and equipment including the replacement of and repair of all tires and tubes, all motor repairs, all mechanical, electrical repairs, oil changes, added oil, lubrication and washing, fuel and fuel taxes, toll charges on roads, bridges, and tunnels, to pay for all license tags on vehicles and equipment herein leased and taxes except as might be otherwise provided.

When these trucks are not in use, they sit idle and FTS is not allowed to use them. The rental fee was $8 per hour. Frank Tempia, Sr., based on his life-long experience in the trucking industry, testified that this amount was a fair and reasonable fee. He stated:

> Considering that we rent ourselves from other people and we rent to other people tractor and driver with all services for $20.00 an hour, in this particular case $8.00 an hour for a tractor and they furnish the driver and they furnish the fuel and the oil and the p.m., it is a fair price.

In addition to the tractor leases, FTL also leased from FTS on September 15 "priority" computer usage time "of ten (10) hours per week in which the Lessee shall have sole-use of the Lessor's complete computer system for programming or operational purposes" for $150 per month and "for the useage of the Lessor's 2nd floor office space and equipment . . . (for) $100.00 per month." The computer and office space is located at FTS' O'Fallon, Illinois, headquarters. FTL has made payments in accordance with the provisions of these seven leases. It does not lease tractors or computer time from anyone other than FTS. FTL also rented office equipment such as desks, chairs, and office furniture from FTS, which is used by FTL at its Hazelwood facility. More recently FTL purchased the equipment. Both the rental and purchase were handled on an informal basis and were not covered by written documents.

The office staff of FTL consists of Frank N., Steven, and Calvin Ford. Both brothers perform duties which are similar to their former responsibilities when employed by FTS. Frank N. handles the customers and accounting. He contacts customers by telephone and in person. None of their customers ever go to FTS' O'Fallon office to conduct business with FTL. To handle the accounting work, it is necessary for Frank N. to go to the computer at the FTS headquarters. The computer is utilized for payroll, as well as freight bills and billing statements. When he works with the computer it is for the exclusive benefit of FTL and he no longer performs computer service for FTS. Steven is in charge of personnel and insurance claims. Since this business is new and their staff is limited, both brothers also perform whatever task that may arise. Calvin Ford is the former dispatcher for FTS and Freeburg Truck Service. He now performs the same duties for FTL.

At the inception of its business, FTL advertised in St. Louis' two daily newspapers, the Globe Democrat and St. Louis Post-Dispatch. Approximately 50 drivers appeared at the Hazelwood office in response to the advertisement. The FTL drivers, Don Wolff, John Vickery, Sam Godat, Olan DeLap, Bruce Kuck, and Dennis Hatches, are not represented by a labor organization and are paid $8 per hour, with the exception of Hatches who is paid $9.16 per hour as a spotter driver. None of the drivers were former employees of FTS, although Don Wolff and Dennis Hatches had worked for Frank Tempia Leasing. Both Charles Riley, a mechanic for FTS, and Dean Uebel, a former FTS driver and occasional owner-operator, may have worked a shift for FTL but neither remained beyond a day.

FTL's primary customer is the Venture Stores.[10] The brothers solicited this business from John Nahm, assistant traffic manager for Venture Stores. They had previously known him when they represented FTS in its dealings with Venture Stores. Approximately 80 percent of their work is with Venture. They also service Schermer, Schnucks Grocery, Welsh Industries, McCulloch, Star Bedding, and International. They have unsuccessfully sought the accounts of Famous Barr, Street Industries, Benjamin Ansehl, Grand Prix, Pyramid, Schlueter, and C & R Metals. In servicing these customers, FTL is not allowed to go beyond the commercial zone.

3. Pre-August meetings

All of the drivers who testified agreed that there had been a series of meetings in 1980 dealing with the financial conditions of FTS. Although the record is unclear as

[10] Venture Stores consists of a large chain of discount stores owned by Famous Barr. Due to the size of Venture, FTL is only one of many trucking firms that handle Venture's freight.

to the number and dates of these meetings, there was very little difference in the recollection of the witnesses concerning the general subject matters that were discussed. Generally the meetings dealt with FTS' deteriorating financial condition. On one occasion when Frank L. Tempia returned from Chicago he called the employees together and told them he was trying to set up an operation with Venture Stores. He explained they all must work together to save the Company, which was going down hill. In May or June, he informed the assembled drivers that the Company had lost several accounts. FTS had previously carried six tractor drivers and four straight truck drivers. Due to the decline in business, the drivers were reduced to five tractor drivers and two straight truck drivers. With the exception of Ronald Renner, all the drivers who testified agreed that business had decreased before the August meeting. However, Ronald Renner admitted that he was only able to work 1 month in the previous 5 months. Ronald Harris testified, "Well, it had been general knowledge that the company was in financial trouble for quite some time."

4. August meeting

Frank L. Tempia gathered his employees for a meeting at the O'Fallon, Illinois, office of FTS on an evening in August. The employees who attended were Dennis Renner, Marlin Fix,[11] Gerald Fix, Frank Gabriel, Ron Harris, Ron Renner, Steve Stovey, Tom Smith, Dean Uebel,[12] Bill Overbey, and Anthony Tempia.[13] Neither Frank N. nor Steven Tempia attended this meeting.

Frank L. Tempia began the meeting by explaining the Company had made vigorous efforts to cut their cost in every area. The had tried various money saving ideas, such as buying a truckload of tires for a greater discount, as opposed to buying them one at a time. None of their efforts were of sufficient impact to offset their business losses. The Company was in serious financial difficulties since it was unable to compete with nonunion trucking companies. Dennis Renner testified that the announcement did not come as a surprise to anyone. He was personally aware that FTS had been underbid by other companies. Both National Distributor and Ken's Express Service had taken substantial portions of FTS' local business. Ken's Express Service had secured the Colonel Days account, a division of Venture, with stores located on the Venture parking lot.

Tempia then suggested he would like the drivers to take a $2-an-hour cut in wage and possibly have the employees pay half of their health and welfare expenses. His comments precipitated bickering between the various employees. Someone suggested that if the Company was actually destitute Tempia should go to the Union and allow it to inspect the books. If in fact the Company was in serious trouble, the Union might be willing to work something out so that FTS could stay in business. Tempia responded that nobody was going to look into his books. Frank Gabriel preferred to drop out of the Union before he would take a $2 cut, because he had a large family to support. Tempia responded that he could not get away with dropping the Union since he had a contract.[14] Bill Overbey remarked that he did not care what happened, but he would refuse to give up his union card since he was approaching retirement and could not risk losing his health and welfare and pension. Dennis Renner said he would not want to drive nonunion but suggested that perhaps they should at least look into insurance with a private company. He recommended an insurance salesman with Equitable Life, from whom he had purchased a life insurance policy. Ron Harris then turned on Dennis Renner and said, "You like it so much why don't you take out a policy!"

Through all this bickering, Marlin Fix, the union shop steward, remained silent. Then his brother Gerald Fix looked over at Marlin and stated, "Just sit there, number one man and don't say nothing." This heated comment was an apparent reference to the fact that Marlin was a senior driver and therefore was safe from potential layoff. Marlin remained silent. In fact, there was no evidence offered that he negotiated with Tempia, nor did he inform his Union of this meeting.

There existed a collective-bargaining agreement between the Union and FTS, which provided a wage scale. However, FTS did not notify the Union that it was conducting meetings with union members concerning changes in wages and benefits.

The meeting ended with Tempia requesting the men to discuss his suggestions and then he warned them that he may start another company in order to survive or make other arrangements to have freight delivered. Gabriel testified that he had been employed by FTS for 7 years. When he was hired he was told the Company was unable to pay union scale wages, but it would as soon as its financial status improved. During those 7 years, FTS never paid scale and Tempia repeatedly told Gabriel, that he would open another company under an assumed name if the O'Fallon facility closed.

Apparently, the general consensus of the drivers was that they had already conceded too much to Respondent FTS and therefore they did not agree to the $2 hourly pay cut nor a change in the payment of their health and welfare. FTS did not cut the hourly wage nor did it require the employees to pay a share of their welfare.

5. John Edward Gonzales

John Edward Gonzales became the business representative for the Union as of December 15, 1976. In that capacity he was assigned the duty to represent the Union in its dealings with FTS. He had previously worked as a shop steward for 8 years.

Gonzales explained that a shop steward is not elected by his fellow workers but selected by and with the approval of the Union. When Gonzales discovered that

[11] Dennis Renner had been the elected shop steward, until at some unknown time he announced he no longer wished to serve. Thereafter, Marlin Fix assumed the duties of shop steward. There was no election and he was not appointed by the Union. However, during the August meeting he was recognized by his fellow workers as their shop steward.

[12] Dean Uebel was the only nonunion driver who attended the August meeting.

[13] Anthony Tempia is the son of Frank L. Tempia. He is employed by FTS as a mechanic and does not represent management.

[14] Gabriel testified that Tempia did not comment after he offered to drop his union membership.

Marlin Fix was acting as the steward, he notified FTS in a letter dated September 22 that Ronald Harris was the new steward. Fix had never been appointed by the Union.

Gonzales testified he had never been notified by FTS that it was conducting a series of meetings directly with union members, which dealt with wage and benefits. He also explained that even if Marlin Fix had been the legitimate steward, his presence would not change the character of the August meetings, since neither a steward nor business representatives have the authority to negotiate a change in the wage scale of an existing collective-bargaining agreement.

On August 14, Steve Stovey filed a grievance, complaining that employees with less seniority were being worked and he had been laid off. The first meeting in regard to this grievance was held at the Belleville Teamsters office where Frank L. Tempia, Steve Stovey, Ron Harris, and Gonzales were present. During the conference it was determined that both Ron Harris and Stovey had taken the drivers' test and were licensed to drive tractor-trailers. It was Tempia's position that neither of them was qualified, regardless of the license. He stated that, in the event that he was required to pay these grievances, he would have no alternative but to open another company and use nonunion drivers, as other trucking companies were doing in Missouri. At the next meeting, September 9, the grievance was settled by Harris accepting 1 day of pay instead of 2 and Stovey accepting 10 days instead of 20.

6. Wages and layoff

Although Respondent FTS provided its payroll records for inspection and Frank L. Tempia answered extensive cross-examination, neither the records nor Tempia shed any appreciable light on the hourly rate each truckdriver received. The Company simply did not maintain records which would show the number of hours each driver worked. The records provide only a gross and net wage figure. Therefore, it was impossible to determine the hourly wage by inspecting the company records. Tempia stated they paid scale, but was unable to state what was the wage rate. In contrast, all of the drivers said that for years they had worked below scale in an attempt to save the Company. The Union was never informed of this fact.

In April 1979, Ron Harris attended a meeting with Respondent FTS, where an agreement was reached concerning wages. A new contract had come into effect April 1, and the drivers wanted to discuss the effect the new wage rate would have on them. They were below scale. Frank L. Tempia agreed to provide employees with the increase provided in the collective-bargaining agreement, plus 25 cents, in an effort to raise the wage rate to within $1 of the actual scale called for in the contract upon its expiration in April 1982. The testimony of those who were laid off reveals that they received $10.22 per hour, instead of the contract rate of $11.97 per hour.

In September, FTS began to lay off its drivers. Steve Stovey was laid off on September 5; Ronald Harris, Thomas Smith, Ronald Renner, and Gerald Fix were laid off on September 19; Frank Gabriel and Dennis Renner were laid off on September 22. The Union was not informed of these layoffs.

C. *Analysis and Conclusions*

1. Wages under the collective-bargaining agreement

Although Frank L. Tempia testified that FTS paid whatever was the agreed scale wages for drivers, the record fails to substantiate his assertions. In fact, all of the drivers testified that when they were laid off they were receiving $10.22 an hour rather than $11.97, which was the amount called for in the current collective-bargaining agreement.

In order to resolve this disputed fact, it is necessary to determine the credibility of the various witnesses. I do not credit Tempia's assertion that FTS paid scale wages. In this area of his testimony he was very evasive. Initially he could not remember what the Company paid the drivers. Then he finally answered in general terms that it paid scale. Perhaps, it is understandable, that any officer of a corporation may have difficulty in remembering the exact hourly wage paid to various workers. However, in the instant case, the crucial question is not the exact amount paid but whether the wage complied with the collective-bargaining agreement. The credible record is overwhelming that the wage was less than scale. Indeed, the Company had a long history of paying less than union scale. For many years, Tempia had circumvented the Union by dealing directly with the drivers. Year after year the drivers were told they must accept less than the contract wage in order to save the Company. Gabriel recalled in a very clear, concise, and credible manner an incident which occurred when he was hired in 1973. At that time he was informed by the Company that they were unable to pay scale, but they would comply with the collective-bargaining agreement as soon as it became financially feasible. This theme was played over and over during Gabriel's 7 years of employment. In view of the testimony of the drivers and the history of FTS, I find it absolutely impossible to accept Tempia's statement, that it paid scale. In fact, the record is replete with credible evidence, proving he was a prime participant in the perpetration of this particular unfair labor practice.

The General Counsel argues and I agree that Respondent FTS violated Section 8(a)(1) and (5) of the Act by paying its drivers less than the collective-bargaining wage scale without having afforded the employees' collective-bargaining representative prior notice and an opportunity to negotiate and bargain with respect to wages. In essence, such conduct represents a repudiation of the collective-bargaining agreement. *Western Pacific Roofing Corporation*, 244 NLRB 501 (1979); *Yates Industries, Inc.*, 238 NLRB 167 (1978); *Fairfield Nursing Homes*, 228 NLRB 1208 (1977).

2. Circumventing employees' collective-bargaining representative

The fact that Frank L. Tempia called a meeting of FTS employees, where he suggested they should consider a $2 an hour pay reduction and a sharing of the cost

of health and welfare benefits, is not in dispute. Tempia was not even questioned on direct or cross-examination concerning this meeting. Although FTS was a party to a collective-bargaining agreement, which set wages, it never notified the Union of its desire to modify the contract. During this August meeting, the drivers were not represented by a union official with the authority to negotiate such changes. At one point, a driver suggested to Tempia that if FTS was in such serious financial difficulty then he should allow the Union to inspect the books. If his fears were substantiated, then the Union might agree to amend the contract. This offer was summarily rejected. It is obvious that Tempia preferred dealing directly with the men. This direct confrontation had the added advantage of dividing the workers and playing upon their individual fears. The August meeting quickly descended into bickering chaos. Each worker sought a solution which would resolve his individual problem. One was willing to forsake the Union if he could save the $2 for his large and needy family. Another worker, who was approaching retirement, was willing to accept the pay cut to save his union pension.

The evidence was unquestioned that Gonzales, the union business agent, was never informed of this meeting and therefore was not given an opportunity to represent the interest of the Union's members. I reject the argument that the drivers were represented by their steward, Marlin Fix. As was explained by Gonzales, Marlin Fix was not properly selected and therefore not a steward. Even if one assumed Marlin Fix was the steward, he would not have possessed the authority to negotiate wage and welfare benefits. It is also interesting to note that Marlin remained mute during the entire meeting and did not even notify the Union of what had occurred.

It is clear that by the above unilateral conduct, Respondent FTS dealt with employees in contravention of its duty to bargain and negotiate with the Union as the exclusive representative of its employees. Such conduct is a well-recognized violation of Section 8(a)(1) and (5) of the Act. *Chester Valley, Inc.*, 251 NLRB 1455 (1980); *Pacific Intercom Co.*, 255 NLRB 184 (1981).

3. Laying off union drivers

The General Counsel has accurately summarized the events following the August meeting. The drivers refused to accept Respondent FTS' proposals to reduce wages and to create an employee-funded health and welfare plan. One month later Steven Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Ronald Renner, Gerald Fix, and Dennis Renner were laid off. It is the position of the General Counsel that these layoffs were in direct response to the drivers' refusal to accept the company proposals and also reflect a long history of disdain for its collective-bargaining obligations. In contrast, Respondent FTS defends the layoffs by arguing that they were based on sound business judgment. Its share of the commercial zone traffic had declined substantially and therefore it had no choice in the matter. It is true that FTS commercial zone work had declined prior to the inception of FTL. Several of the union drivers testified that prior to the August meeting they were aware that two rival St. Louis nonunion freight companies had won a substantial portion of FTS' business. Thus the question is raised whether Respondent FTS was motivated to layoff its drivers by decline in business or because of the drivers' refusal to acquiesce to the Employer's proposal to lower wages and create an employee-funded health plan. Was the decline in business simply a pretext to free the Company of its collective-bargaining obligations?

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board has provided a clear explanation as to the distinction that must be maintained between "pretext" and "dual motive." It is pretextual when the evidence reveals that what the employer had advanced as a legitimate business reason for its action is in fact a sham, in that the purported rule or circumstances advanced by the employer did not exist or was not in fact relied upon. As previously indicated, Respondent contends the layoffs were based on sound business judgment, namely, a decline in business. If in fact, the Company, in good faith, considered the decline in business, such reliance is not pretextual. However, Respondent may still be guilty of unfair labor practices, if its actions fall within the purview of the dual motive, as defined in *Wright Line, supra*.

Obviously, Respondent FTS, through its president, Frank L. Tempia, preferred to deal directly with its union drivers and ignore its obligations under the collective-bargaining agreement. Tempia stated in no uncertain terms that the Company could not survive if the men refused to accept a pay cut. He perceived only two possible choices to the Company's financial quagmire.

If the cost were not reduced through the pay cut then the operation would cease. The fact that the employees recognized the threats to their Union and their own personal security was graphically illustrated by their emotional outburst that accompanied Tempia's proposals. Within a month after their refusal to accept the wage reduction and change in benefits, the men were laid off. Clearly this sequence of events was not coincidental and when considered collectively it supports the proposition that the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to lay off the drivers. Once this is established, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. Respondent FTS has failed to meet this burden.

Although both Tempia and the drivers expressed their opinion that the commercial zone work had decreased, not a scintilla of evidence was offered to prove the extent of the decline. Surely, an analysis of past and present corporate account receivables, billing sheets, customer contracts, and tax records would reveal the extent of the Company's losses. Without some proof, I am left to speculate whether sound business judgment justified the abrupt layoff of seven men. The economic condition of FTS may well have justified the above layoffs. However, the record is void of probative evidence which would firmly support such a premise.

Even if one assumes that the layoffs were based on sound business judgment, the burden would still shift to Respondent to prove that the layoffs would have taken place even in the absence of the drivers' exercise of protected conduct. FTS has not met this burden.

FTS' flagrant disregard for the protected rights of its workers and its obligation under the collective-bargaining agreement is confirmed by an examination of Frank L. Tempia's past conduct. For years he was able to impose his will on his drivers. In a perfunctory manner he would periodically bind FTS to a collective-bargaining agreenent with the Union and then ignore its provisions. Without providing the Union with an opportunity to represent its members over wage and benefit changes, Tempia would go directly to the drivers. In a coercive manner, he played upon the fears of his employees that their jobs would cease if they did not accept below scale wages. Finally, the workers reached a point where they felt they could no longer retreat. It was in that atmosphere, following their refusal to accept the $2-per-hour wage cut, that the layoffs began. So long as the drivers were willing to submit to the demands of the Company and ignore their rights under the collective-bargaining agreement, labor harmony flourished.

Having considered the foregoing, I find that although Respondent FTS may have taken into account the decline in business in arriving at its decision to layoff the drivers, I am not convinced that it would have reached the same decision absent the protected conduct. The drivers' refusal to accept a lower wage and a change in benefits was the "motivating factor" in the Company's decision to layoff the drivers.

4. *Alter ego*

a. *Applicable principles*

As originally stated in *L. E. Davis d/b/a Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962), and reaffirmed in *Holiday Inn of Benton*, 237 NLRB 1042, 1044 (1978), the Board looks to four principal factors in determining whether two arguably separate employers will be treated as a joint employer. These factors are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. While no individual factor has been held to be controlling, emphasis is placed on the first three factors, particularly centralized control of labor relations. *Stoll Industries, Inc.*, 223 NLRB 51, 53–54 (1976), enfd. 551 F.2d 301 (2d Cir. 1977); *Gerace Construction, Inc. and Helger Construction Company, Inc.*, 193 NLRB 645 (1971). *Alter ego* status will generally be found where the two enterprises have "substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership." *Crawford Door Sales Company, Inc. and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976).

b. *Common ownership—financial control*

Frank N. Tempia and Steven J. Tempia are equal and sole owners of FTL, Inc. They have never owned or had financial control of FTS. FTS is owned by Frank L. Tempia, Pearl Skaer, and Doris Tempia. It should also be noted that even before Frank N. Tempia and Steven Tempia resigned their positions with FTS, neither of them owned any portion or exercised any financial control over FTS.

It is true that Frank L. Tempia personally lent $5,000 to his sons' new corporation. This loan was secured by a series of promissory notes which will mature in September 1983. The record is void of any indication that this transaction was not conducted in an "arm's length" atmosphere. To say this loan provided Frank L. Tempia with financial control over his sons' enterprise would require rank speculation.

The only other financial connections between the two corporations are a series of leases. The record substantiates the assertions, by Respondents, that all of the leases were negotiated through an "arm's length" transaction. Indeed, the record is totally void of any evidence which would challenge their assertions. It was a common practice for FTS to lease their tractors to anyone. The standard rental fee for a driver and a fully fueled and maintained tractor was $20 per hour. Since FTL leased the tractor for $8 per hour, paid their own drivers $8 per hour, and was required to furnish the fuel, I find the leases on the tractors were reasonable and legitimate. Similarly, the leases for the rental of computer time and the second floor of the FTS headquarters were introduced without an indication that the agreed amounts were lower than the true market value. In addition, FTL has fully paid the amounts required by the leases. Therefore, I am compelled to conclude that all of the leases were negotiated and administered in an "arm's length" manner. The agreed amounts were reasonable and do not represent a method by which FTS could funnel funds to FTL by providing below market rentals, nor in any manner provide FTS with a method of financially controlling FTL.

In the present case, I do not find probative evidence which would reveal common ownership or financial control by FTS. The General Counsel has relied on *Sakrete of Northern California, Inc., supra*, and other cases, which are readily distinguishable, ". . . as they involved situations where both enterprises were either wholly owned by members of the same family or nearly totally owned by the same individuals . . . ." *Clinton Foods, Inc., d/b/a Morton's I.G.A. Foodliner; and its alter ego or joint employer Sam & Ed's Inc.*, 240 NLRB 1246, fn. 2 (1979). Although in the instant case both companies are owned by members of the same family, the ownership of the two enterprises is not identical. However, I am mindful that identical corporate ownership is not the *sine qua non* of *alter ego* status. *Crawford Door Sales Company, Inc. and Cordes Door Company, Inc., supra.*

c. *Common management*

As in the case of ownership, management in these two corporations is totally distinct. After their resignation on August 15 as officers and directors, the Tempia brothers never again participated in the management of FTS. Their attention was turned to their own company. Likewise Frank L. Tempia his wife, and mother continued to

devote their energies to FTS and never participated in the running of FTL.

d. *Interrelation of operations and centralized control of labor management*

It is undisputed that the articles of incorporation of each company set out nearly identical business purposes. In general, the articles provide for the transporting of personal property. Although their stated purpose is nearly tbe same, in reality there are significant variances. FTL, a Missouri corporation with headquarters in Hazelwood, Missouri, was founded in 1980. Its ability to haul freight is limited by the geographical boundaries of the commercial zone. As a result, it cannot carry freight beyond 20 or 25 miles from the corporate limits of St. Louis and East St. Louis. In contrast, FTS, an old established Illinois corporation, cannot only haul freight within the commercial zone but also as a common and contract carrier throughout Missouri and Illinois, as well as parts of Kansas and Indiana.

It is also true that Venture Stores is the primary customer of both corporations. However, there is no evidence to show that FTS shifted its Venture business to FTL. Indeed, the record is clear that FTS began losing substantial portions of the Venture business to other freight companies before FTL was formed. Of course, the balance of FTS' business was not in competition with FTL since it dealt with freight hauling beyond the common carrier zone.

As previously stated, FTL leased all of its tractors from FTS. These tractors were for the exclusive use of FTL. With the exception of the computer, the two companies did not share any equipment. The use of the computer was not interrelated. Frank N. Tempia operated the computer, in keeping with the lease, for business matters pertaining only to FTS, while Doris Tempia utilized the computer for FTS and the Leasing Company.

After reviewing the surrounding circumstances, I find that, although these two companies had nearly identical business purposes, they were maintained as two totally independent corporations in regard to their operations. This separation of management is equally true in regard to the control of labor management. At all times Frank L. Tempia controlled labor management of FTS. This was true even when his sons were officers, directors, and employees of FTS. When the sons formed their own company, Steven Tempia was in charge of personnel. Other than the brothers, Calvin Ford was the only worker who had previously been an employee of FTS. The control of labor management of these two freight companies was never in the hands of the same individuals.

I credit the recollection of Gonzales and the drivers that on several occasions Frank L. Tempia threatened to establish a nonunion freight company if the drivers failed to accept his proposals or if he was forced to comply with a grievance. However, I do not accept the argument that these blustering statements represent proof that Tempia established FTL or that the former is the *alter ego* of FTS. To arrive at such a conclusion would unjustifiably bind the Tempia brothers to statements by a third party not within their control. At the very most, Tempia's statements may raise an inference to be considered along with all of the evidence.

On the basis of the above, I find that FTS and FTL are two separate and independent corporations. FTL is not the *alter ego* of FTS and therefore I shall recommend that all complaints filed against FTL be dismissed in their entireties.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent FTS, as set forth above, occurring in connection with its described operations, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondents Friederich Truck Services, Inc., and FTL, Inc., are employers within the meaning of Section 2(2) of the Act, engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent FTL, Inc., did not violate the Act and is not the *alter ego* of Respondent Friederich Truck Service, Inc.

4. By laying off and refusing to reinstate Stephen Stovey, Ronald Harris, Thomas Smith, Ronald Renner, Gerald Fix, Frank Gabriel, and Dennis Renner, for their refusal to acquiesce in the proposed unilateral changes in the terms of the collective-bargaining agreement, Respondent FTS violated Section 8(a)(3) and (1) of the Act.

5. The unit appropriate for collective bargaining is:

> All truckdrivers, warehousemen, helpers, dockmen, checkers, power-lift operators, hoisters, and such other employees engaged in the local pick-up, delivery, and assembling of freight within the area located within the jurisdiction of the Local Union, not to exceed a radius of 25 miles.

6. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

7. By bypassing the Union and directly dealing with employees by (a) paying them less than the contractual wage scale required by the collective-bargaining agreement, and further (b) proposing in a company meeting to the union employees that they accept additional wage cuts and participate in an employee-funded health and welfare plan, in contravention of the existing collective-bargaining agreement and without obtaining the Union's consent to those changes and modifications, Respondent FTS has violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. FTS has not violated the Act in any other manner than as specified above.

THE REMEDY

Having found that FTS has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that certain affirmative action be taken by it to effectuate the policies of the Act. I shall recommend that FTS be ordered to restore the wages, hours, and terms and conditions of employment to the levels required by its collective-bargaining agreement with the Union, and to make whole its employees for any losses suffered, since March 30, 1980, as a result of its unlawfully paying less than the hourly wage provided in the collective-bargaining agreement,[15] with interest on the amounts owing, to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see also *Olympic Medical Corporation*, 250 NLRB 146 (1980). In addition, Respondent FTS shall restore Stephen Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Dennis Renner, Ronald Renner, and Gerald Fix to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay, including loss of fringe benefits, they may have suffered by reason of the discrimination against them. Backpay shall be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be paid on the amounts owing and to be computed in the manner prescribed in *Florida Steel Corporation, supra*; see generally, *Isis Plumbing & Heating Co.*, 139 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Friederich Truck Service, Inc., O'Fallon, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to abide by the terms of the collective-bargaining agreement with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, effective by the terms of said agreement from April 1, 1979, through March 31, 1982, by directly dealing with employees and by entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreement with the Union.

(b) Laying off, suspending, discharging, or otherwise discriminating against employees with regard to wages, hire or tenure of employment, or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by the National Labor Relations Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Comply with the terms and conditions of the above-described collective-bargaining agreement and make the drivers whole for any wage losses they have suffered after March 30, 1980, as a result of FTS paying below the wage scale rates found in the said collective-bargaining agreement, in the manner set forth above in the section of this Decision entitled "The Remedy."

(b) Offer Stephen Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Dennis Renner, Ronald Renner, and Gerald Fix immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth above in the section entitled "The Remedy."

(c) Upon request, bargain collectively with the Union with respect to wages, hours, and conditions of employment of Respondent's drivers who are represented by the Union and are covered by the aforesaid collective-bargaining agreement, and who constitute an appropriate bargaining unit under the Act.

(d) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatement rights set forth in the section entitled "The Remedy."

(e) Post at its O'Fallon, Illinois, facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 14, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including

[15] The record reveals that for many years FTS has paid less than the hourly wage called for in the successive collective-bargaining agreements. Although it is difficult to pinpoint when this practice began, Gabriel testified that FTS told him when he was hired in November 1973 that they could not pay full scale. In the instant case, there is no evidence that Respondent fraudulently concealed from the Union that it paid hourly wages below the rate set by the collective-bargaining agreement. Therefore, the remedial order for a retroactive date is limited by Sec. 10(b). *Don Burgess Construction Corporation d/b/a Burgess Construction and Don Burgess and Verlon Hendrix d/b/a V & B Builders*, 227 NLRB 765 (1977), enfd. 596 F.2d 378 (9th Cir. 1979).

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, as exclusive bargaining representative of our employees in the following appropriate unit with regard to rates of pay, wages, hours, and other terms and conditions of employment:

All truck drivers, warehousemen, helpers, dockmen, checkers, power-lift operators, hoisters, and such other employees engaged in the local pick-up, delivery, and assembling of freight within the area located within the jurisdiction of the Local Union, not to exceed a radius of 25 miles.

WE WILL NOT fail and refuse to abide by the terms of the collective-bargaining agreement with the International Brotherhood of Teamstes, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 50, effective by the terms of said agreement from April 1, 1979, through March 31, 1982, by directly dealing with employees and by entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreement with the Union.

WE WILL NOT lay off, suspend, discharge or otherwise discriminate against employees with regard to wages, hire or tenure of employment, or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

WE WILL NOT offer to bargain or bargain directly with employees in the above-described bargaining unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of any right guaranteed them by the National Labor Relations Act.

WE WILL comply with the terms and conditions of the above-described collective-bargaining agreement and make the drivers whole for any wage losses they have suffered after March 30, 1980, as a result of FTS paying below the wage scale rates found in the said collective-bargaining agreement, with interest.

WE WILL offer Stephen Stovey, Ronald Harris, Thomas Smith, Frank Gabriel, Dennis Renner, Ronald Renner, and Gerald Fix immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, with interest.

FRIEDERICH TRUCK SERVICE, INC.